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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. JACK NELSON NOTTINGHAM, Defendant and Respondent.	E047230 (Super.Ct.No. BAF004723) O P I N I O N

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed.

Rod Pacheco, District Attorney, and Matt Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Lauren E. Eskenazi, under appointment by the Court of Appeal, for Defendant and Respondent.

I. INTRODUCTION

Defendant Jack Nelson Nottingham moved to dismiss a two-count felony information pursuant to the Interstate Agreement on Detainers Act (the IAD). (Pen. Code, §§ 1389-1389.8.)[1] The trial court granted the motion on the grounds defendant was not brought to trial within 120 days of the date he arrived in California from Nevada to face the charges and there was no good cause shown for a continuance beyond the 120-day period. (§ 1389, arts. IV, subd. (c), V, subd. (c).)[2] The People appeal, arguing the motion was erroneously granted. We conclude the motion was properly granted and affirm the judgment dismissing the information with prejudice.[3]

II. OVERVIEW OF THE IAD

The IAD is a compact among California and 47 other states, including Nevada, the federal government, and the District of Columbia, which provides for the administrative transfer of prisoners wanted in other states for trial on criminal charges. (Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2009) § 50.49, p. 1708.) The purpose of the IAD is "to encourage expeditious disposition of criminal charges through cooperative procedures among the member jurisdictions." (*People v. Brooks* (1987) 189 Cal.App.3d 866, 872; § 1389, art. I.) To this end, the IAD "establishes 'procedures for the transfer of

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] All further references to articles are to the articles of section 1389.

[3] The information charged defendant with the aggravated assault of his girlfriend with a vehicle, and inflicting corporal injury resulting in a traumatic condition on the girlfriend. (§§ 245, subd. (a), 273.5, subd. (a).)

prisoners incarcerated in one jurisdiction to custody of another jurisdiction where criminal charges are pending.' [Citation.]" (*Netzley v. Superior Court* (2008) 160 Cal.App.4th 348, 353-354 [Fourth Dist., Div. Two].) The IAD is codified in section 1389. (*People v. Lavin* (2001) 88 Cal.App.4th 609, 612.)

The IAD does not apply, and prisoners may not assert any rights under it, unless a detainer, based on an untried indictment, information, or complaint, has been lodged against the prisoner. (*People v. Brooks, supra,* 189 Cal.App.3d at p. 872; *People v. Castoe* (1978) 86 Cal.App.3d 484, 489-490.) A detainer is defined as """a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction."""" (*People v. Garner* (1990) 224 Cal.App.3d 1363, 1369, quoting *United States v. Mauro* (1978) 436 U.S. 340, 359.) The warden or other official having custody of the prisoner is required to "promptly inform" the prisoner of the "source and contents of any detainer lodged against him" and his "right to make a request for final disposition" of the charges on which the detainer is based. (§ 1389, art. III, subd. (c).)

Article III sets forth the procedures a prisoner is required to follow in requesting a final disposition of charges on which a detainer is based. (*People v. Rhoden* (1989) 216 Cal.App.3d 1242, 1249.) The prisoner is required to submit a written request for a final disposition to the warden or other official having custody of him. (§ 1389, art. III, subds. (a), (b).) That official, in turn, is required to "promptly forward" the prisoner's request to the "appropriate prosecuting official and court" in the jurisdiction in which the charges

are pending (the receiving state), together with the official's "certificate . . . stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner." (§ 1389, arts. II, III, subds. (a), (b).)

Regardless of whether a prisoner initiates a final disposition of charges pursuant to article III, the prosecutor or "appropriate officer" who has lodged a detainer against the prisoner may obtain temporary custody of him for trial by following the procedures outlined in article IV. The prosecutor must submit a request for temporary custody of the prisoner to the court having jurisdiction of the charges, the court in turn must "duly approve" and "record" the prosecutor's request for temporary custody and transmit it to "appropriate authorities" in the state in which the prisoner is incarcerated. (§ 1389, art. IV, subd. (a).) Upon receipt of the prosecutor's request, the authorities in the sending state must furnish the prosecutor with the same certificate described in article III, setting forth the prisoner's term of commitment and other particulars concerning his sentence and parole. (§ 1389, art. IV, subd. (b).)

When a prosecuting authority requests temporary custody of a prisoner pursuant to article IV, trial on the charges must be commenced within 120 days of the date the prisoner arrives in the state having jurisdiction of the charges. (§ 1389, art. IV, subd. (c).) When, however, the prisoner requests final disposition of charges in accordance with article III, trial must commence within 180 days of the date the prisoner's request is

"delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction." (§ 1389, art. III, subd. (a).) If trial is not commenced within either the 120-day or 180-day periods, whichever applies, the charges must be dismissed with prejudice (§ 1389, art. V, subd. (c)), unless the court having jurisdiction of the charges grants "any necessary or reasonable continuance" of the trial beyond the 120-day or 180-day periods "on good cause shown in open court" (§ 1389, arts. III, subd. (a), IV, subd. (c)).

III. PROCEDURAL HISTORY

On April 10, 2006, the People filed a felony complaint against defendant in the present case, charging him with aggravated assault with a vehicle on Jane Doe (§ 245, subd. (a)) and inflicting corporal injury on Jane Doe resulting in a traumatic condition (§ 273.5, subd. (a)). Both crimes were alleged to have occurred on January 21, 2006. Three prison priors, one prior serious felony conviction, and one prior strike conviction were also alleged. (§§ 667.5, subd. (b), 667, subd. (a), 667, subds. (b)-(i).) On April 11, a warrant was issued for defendant's arrest.

On July 21, defendant mailed a handwritten pleading or motion to the Riverside County Superior Court entitled "P.C. § 1389 Demand for Trial," stating he was "mov[ing] this court for an order bringing [him] to trial" in the present action, and requesting that the "pending charges be dismissed" if he was "not brought to trial within the time limits set by . . . sections 1381 and 1382."[4] The demand further stated that

[4] Sections 1381 and 1382 prescribe 90- and 60-day time limits, respectively, for bringing a criminal defendant to trial under certain circumstances. Section 1381 applies to a defendant who is serving a term in a California state prison or a term of more than 90

[footnote continued on next page]

defendant was "currently in [the] custody of the sheriff of Clark County[,] Nevada," and would "be sentenced to serve 1 to 6 years in the Nevada Department of Correction on August 23, 2006." The court filed the motion on August 14.

On August 7, defendant mailed another handwritten motion to the court requesting that an attorney be appointed to represent him. The court filed this motion on August 30. On September 20, the court filed defendant's handwritten notice of change of address indicating he had been moved to High Desert State Prison in Indian Springs, Nevada. On October 5, the court forwarded defendant's "P.C. § 1389 Demand for Trial" to the People, after noting it "appear[ed] to be a [section] 1381 Demand." On the same date, the court took no action on defendant's motion for appointment of counsel.

On November 16, the People sent a letter to the Nevada Department of Prisons in Carson City, Nevada, referencing defendant's name and the present action. The letter stated, in pertinent part: "A detainer has been lodged by this office against the above-

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[footnote continued from previous page]
days in a California county jail and who is to be tried or sentenced in another proceeding pending in California during the period of his incarceration. The defendant may deliver written notice of his place of incarceration to the district attorney in the county where charges are pending against him or he remains to be sentenced, and his desire to be tried or sentenced in the proceeding. The district attorney must bring the defendant to trial within 90 days following his receipt of the defendant's notice and demand. (§ 1381.) Section 1381 did not apply to defendant because he was not serving a term in a California state prison or California county jail.

Section 1382 generally requires that a felony information be dismissed if the defendant is not brought to trial within 60 days following his arraignment on the information. At the time defendant presented his "P.C. § 1389 Demand for Trial," the present two-count felony information had not been filed. Only the felony complaint filed on April 10, 2006, was pending.

named defendant who is presently incarcerated in your institution. [¶] Information has been received by this office that [defendant] is willing to sign Forms I and II of the Agreement on Detainers. If so, we would appreciate receiving Forms II, III and IV duly executed so that we may proceed to return [defendant] to this jurisdiction for trial, pursuant to the provisions of Article IV[, subdivision] (c) of the Agreement on Detainers."

The record does not include a copy of any detainer lodged by the People against defendant on the present charges, but the People's November 16 letter plainly states that such a detainer was lodged. The record also does not indicate whether, or if so when, the Nevada Department of Prisons completed the forms the People requested in their November 16 letter, or when defendant was transported from Nevada to California to face the present charges. The record does show, however, that on February 8, 2007, defendant was arraigned in the trial court on the felony complaint and, with advice from counsel, entered a plea of not guilty. Thus, defendant was present in California no later than February 8, 2007.

A preliminary hearing was held on March 8 and defendant was held over for trial. On March 20, the present two-count felony information was filed alleging the same charges and enhancements alleged in the complaint. On March 22, defendant pled not guilty and denied the enhancements. The trial court set a jury trial for May 3, and calculated the "last day for trial" to be May 21, pursuant to section 1382. The trial court

did not calculate a last day for trial pursuant to the 180-day period of article III or the 120-day period of article IV.

At an April 19 trial readiness conference, trial was continued from May 3 to May 10. On May 2, 4, and 10, defendant filed *Marsden*[5] motions seeking to replace his defense counsel, Attorney C. Kenyon. Attorney Kenyon continued to represent defendant after May 10, however. On May 10, the trial was trailed to May 17. Defense counsel was ready, but the prosecutor was engaged in another trial. Defendant objected to the continuance.

On May 17, neither the defense nor the People were ready, but defendant again did not wish to waive time. The trial court found good cause for a continuance, and the trial was continued to May 29 (beyond the 60-day time limit of § 1382) over defendant's objection. On May 29, defense counsel was ready for trial but the People requested that the matter be trailed to June 5. The court trailed the matter to June 5. On June 5, Attorney Kenyon was ill and the defense requested a two-day continuance to June 7. The court found good cause for the two-day continuance to June 7.

On June 7, Attorney Kenyon appeared. On its own motion, the court continued the trial to June 11 and set a hearing on defendant's *Marsden* motions on the same date. On June 11, defendant withdrew his *Marsden* motions and the defense was ready, but the matter was continued to June 13 at the request of the prosecution. On June 13, defense

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[5] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

counsel expressed doubt concerning defendant's mental competence to stand trial. The proceedings were suspended pursuant to section 1368.

More than 10 months later, on April 28, 2008, the proceedings resumed after the defense withdrew its section 1368 motion, and trial was set for June 17, 2008. The trial date was vacated, reset, and continued several more times at the request of the defense and the prosecution. Each time, defendant objected to the continuances. On September 25, 2008, Attorney Christopher Oliver was substituted in place of Attorney Kenyon to represent defendant. On October 1, 2008, the trial court heard and denied defendant's motion to dismiss the information pursuant to section 1382.

Finally, on October 2, 2008, the defense filed a motion to dismiss the information pursuant to section 1389. The trial court heard and granted the motion on the same date. The People did not file a written opposition but opposed the motion orally.

In his motion, defendant essentially argued that he was not brought to trial within either the 180-day time period of article III or the 120-day time period of article IV, he never consented to waive time for trial, and there was no good cause shown in open court for any of the continuances of the trial. Reporter's transcripts of the May 17, May 29, June 5, and June 7, 2007, hearings were attached to the motion. At the hearing on the motion, the court also received into evidence the People's November 16 letter to the Nevada Department of Prisons. No one testified and no other evidence was presented on the motion.

Although not expressly discussed at the hearing or in defendant's motion, the 120-day and 180-day periods *both expired no later than June 8, 2007*, 120 days after February 8, 2007, the date defendant was arraigned on the complaint.[6] Defendant must have arrived in California no later than the date of that arraignment. (§ 1389, art. IV, subd. (c).) And, as indicated, the court filed defendant's demand for trial on August 14, 2006, and sent it to the prosecution on October 5, 2006. These dates were more than 180 days before June 8, 2007. (§ 1389, art. III, subd. (a).)

The focus at the hearing was on whether defendant had ever waived time for trial, requested a continuance of the trial, or whether good cause for a continuance was shown on the record at any time after defendant was arraigned on the complaint. The People argued there was good cause for each continuance of the trial "whether it was specifically stated or not," and if not specifically stated it should be presumed that the court was acting in accordance with the law and found good cause for each continuance.

In response to the People's argument, the trial court said: "[M]y concern is that . . . [a]rticle IV . . . states that: Trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction, may grant [any] necessary [or] reasonable continuance. [¶] 'For good cause shown,' in my mind, is not the absence of good cause and the presumption that there is regularity in the proceedings, but a stated

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[6] Defendant's motion mistakenly stated he was arraigned on February 2, 2007. This variance is immaterial, however.

good cause, of which there is none. *And there is not just the absence of a time waiver. There is the insistence that—and an affirmative statement by the defendant that he does not waive time. And so . . . if you cannot show this court any request for a continuance by the defendant, I think that this motion must be granted*." (Italics added.)

Defense counsel conceded there was good cause to continue the matter from June 5 to June 7, 2007, due to the illness of Attorney Kenyon. Still, defense counsel argued that the record did not reflect good cause for the continuance from June 7 to June 11, and June 8 was the last possible date for trial under either the 120-day or 180-day time periods of section 1389.

IV. DISCUSSION

The People claim defendant's section 1389 motion to dismiss the information was erroneously granted for several reasons. They first argue there is no evidence that they lodged a detainer against defendant on the present charges. Not so. As indicated, the lodging of a detainer is a necessary precondition to triggering either the 180-day time limit of article III or the 120-day time limit of article IV. (§ 1389, arts. III, subd. (a), IV, subd. (a); see, e.g., *People v. Brooks, supra,* 189 Cal.App.3d at p. 871.) The November 16, 2006, letter from the People to the Nevada Department of Prisons states that the People had previously lodged a detainer against defendant on the charges pending in the present action. Although the record does not include a copy of the detainer, the letter supports a reasonable inference that a detainer on the present charges was lodged

sometime before November 16, 2006. (See *People v. Lavin, supra,* 88 Cal.App.4th at p. 616 [record sufficient to show detainer had been lodged].)

The People next argue that defendant did not comply with the requirements of article III in processing his "P.C. § 1389 Demand for Trial." We agree. Although defendant's demand may have constituted a request for a final disposition of the present charges against him, it was not submitted to the warden or other official having custody of defendant in Nevada, nor was it accompanied by a certificate from that official stating defendant's term of imprisonment and other particulars concerning his Nevada sentence, as article III requires. (§ 1389, art. III, subds. (a)-(b); see, e.g., *People v. Lavin, supra,* 88 Cal.App.4th at pp. 616-617 [letter to court, unaccompanied by warden's certificate, did not comply with art. III]; *People v. Rhoden, supra,* 216 Cal.App.3d at pp. 1252-1253 [letter to district attorney, unaccompanied by warden's certificate, did not comply with art. III].) Accordingly, the 180-day time limit of article III was never triggered, and defendant was not entitled to a dismissal of the information pursuant to article III. (*People v. Lavin, supra,* at p. 617; *People v. Rhoden, supra,* at p. 1252.)

Defendant concedes his demand for trial did not comply with the requirements of article III. He argues, however, that his motion for dismissal was alternatively based on articles III and IV, and the record—including the People's November 16, 2006, letter—shows he was transferred from Nevada to California pursuant to the People's request for temporary custody of him pursuant to article IV. We agree that the record supports a reasonable inference that defendant was transferred to California pursuant to article IV.

The November 16 letter stated, in pertinent part: "Information has been received by this office that [defendant] is willing to sign Forms I and II of the Agreement on Detainers. If so, we would appreciate receiving Forms II, III and IV duly executed so that we may proceed to return [defendant] to this jurisdiction for trial, pursuant to the provisions of *Article IV*[*, subdivision*] *(c)* of the Agreement on Detainers." (Italics added.) Without more, the letter's reference to *article IV, subdivision (c)*, together with defendant's appearance in California at his February 8, 2007, arraignment, supports a reasonable inference that defendant was transferred to California pursuant to article IV and arrived in California no later than February 8.

The People argue that the November 16 letter mistakenly referred to article IV and should have referred to article III. As defendant points out, however, there is no support in the record for this assertion, and the letter, on its face, is consistent with both an article III demand for disposition and an article IV request for transfer. There is no indication in the record whether the People ever received any of the forms they requested from the Nevada Department of Prisons; nor is there any indication of the content or purpose of any of the forms referenced in the letter. The letter plainly states that the People were seeking defendant's transfer pursuant to article IV, and no evidence was presented to indicate that defendant was *not* brought to California pursuant to article IV. Thus, on this record, defendant met his burden of showing he was transferred to California pursuant to article IV.

The People argue that defendant *waived* his section 1389 speedy trial rights when, at the April 19, 2007, trial readiness conference, he failed to object when the trial court continued the trial from May 3 to May 10. This continuance did not extend the trial beyond the 120-day period, however, which expired, at the earliest, on June 8, 2007.[7] Thus, by failing to object to the May 3 to May 10 continuance, defendant did not waive his right to have trial commence within the 120-day period. (Cf. *Drescher v. Superior Court* (1990) 218 Cal.App.3d 1140, 1148 [defendant waived his IAD rights by "freely acquiescing" to setting trial beyond the 120-day period]; *People v. Sampson* (1987) 191 Cal.App.3d 1409, 1414-1417 [defendant waived his IAD rights by remaining silent when his defense counsel requested to continue the trial to a date after the 180-day period expired]; see also *People v. Nitz* (1990) 219 Cal.App.3d 164, 167-170 [defendant waived his IAD rights by failing to object, both before and after the 180-day period expired, to setting trial after the 180-day period expired].)

The only question remaining is whether good cause was shown *on the record before the trial court* for continuing the trial past the 120-day time period. As discussed, when a defendant is transferred to California for trial pursuant to article IV, trial must commence within 120 days of the date the defendant arrives in California; however, the court may grant "any necessary or reasonable continuance" for "good cause shown in

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[7] Defendant claims the 120-day period expired on June 7, 2007, but June 7 was only 119 days after February 8, the date defendant was arraigned and the date by which he must have arrived in California from Nevada to face the present charges. (§ 1389, art. IV, subd. (c).)

open court." (§ 1389, art. IV, subd. (c).) A showing of good cause is similarly required to extend the 180-day period of article III. (§ 1389, art. IV, subd. (c).)

Section 1382 also requires a showing of good cause for a continuance beyond the 60-day period of that statute. (See *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275.) And, when a defendant has not entered a general time waiver and requests or consents, either expressly or impliedly, to the setting of the trial date beyond the 60-day period, the defendant "shall be brought to trial on the date set for trial or within 10 days thereafter." (§ 1382, subd. (a)(2)(B).)

Contrary to the People's position, there is no authority for adding 10 additional days to the 120- or 180-day period of section 1389. Instead, there are only two ways to extend either period: (1) for good cause shown in open court; and (2) for so long as the prisoner is unable to stand trial. (*Netzley v. Superior Court, supra,* 160 Cal.App.4th at p. 354.) In addition, the trial court's authority to continue the 120- or 180-day period for good cause applies only when the 120- or 180-day period, whichever applies, is *imminently* about to expire. (*Ibid*.) [8]

Here we are concerned with whether good cause was shown for continuing the trial *to a date certain* past June 8, 2007, which, as indicated, was the earliest date the 120-day period could have expired. As pertinent, the record shows that on May 29, the

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[8] The unavailability of witnesses, for example, has been held to constitute good cause to extend either period. (*People v. Posten* (1980) 108 Cal.App.3d 633, 643 [180-day period]; *State v. Collins* (1976) 29 N.C.App. 478 [224 S.E.2d 647, 649] [120-day period].)

People were ready for trial but the defense was not, and the court continued the trial to June 5. On June 5, trial was continued at the request of the defense to June 7, due to the illness of defense counsel. June 7 was, of course, only one day short of June 8, the earliest date the 120-day period could have expired. Thus, on June 7 the 120-day period was *imminently* about to expire.

On June 7, the defense was ready for trial but the prosecution was not, and the trial was continued on the court's own motion to June 11, without a showing or a finding of good cause. Even if the extension from June 5 to June 7 tolled the expiration of the 120-day period for two days, from June 8 to June 10, the 120-day period still expired on June 10. And, on the record before the trial court, no good cause was shown for continuing the trial from June 7 to June 11, past the expiration of the 120-day period.[9]

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[9] The People did not argue in the trial court and do not argue on this appeal that defendant waived his section 1389 speedy trial rights at any time *after* June 8 or 10, 2007. Nor, in our view, would the record support such an assertion. On June 11, the trial was continued to June 13, at the request of the People, who were still not ready, and without a showing of good cause. Then, between June 13, 2007, and April 28, 2008, the proceedings were suspended to determine whether defendant was competent to stand trial. (§ 1368.) On April 28, 2008, the defense withdrew its section 1368 motion and the proceedings resumed. On that date, defendant was present in court but did not object to setting the trial on June 17, 2008, over one year past the expiration of the 120-day period. But in view of the lengthy amount of time the proceedings had been suspended, there was good cause to set the trial date within 60 days of April 28, 2008. (*Rhinehart v. Municipal Court, supra,* 35 Cal.3d at p. 781[good cause depends upon circumstances of the case].) Thereafter, trial was continued several more times, and each time either defense counsel or defendant objected to the continuance.

V. DISPOSITION

The judgment dismissing the information with prejudice is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.